85. The CAPs admit that AT&T accurately describes the Commission's findings in its Farmers & Merchants decisions. The CAPs admit that Farmers argued on appeal that the access stimulation service it provided was not a "common carrier" service, and that the D.C. Circuit Court of Appeals rejected that argument. Those decisions have no bearing on the common carrier status of the CAPs, however. The Commission has never found any CLEC to be a "sham," other than Total Telecom and the CAPs, and never made such a finding against Farmers. In addition, the Farmers assertion of non-common carrier status, and the court's rejection of that argument, were both summary statements, made without discussion or support. In contrast, the CAPs have laid out in their Petition for Reconsideration and Clarification of the *Liability Order*[79] the multiple reasons the *Liability Order* confirms they are not common carriers, fully supported and in substantial detail. The CAPs explain in detail why, as a result of the *Liablity Order*, they are not subject to Title II regulation. The Commission has not responded to these arguments, and the CAPs repeat them in the Brief that accompanies this Answer.

86. The CAPs admit that AT&T accurately describes the Commission's findings in its *Northern Valley* orders, but deny that these findings have any relevance to the regulatory classification of the CAPs. The Commission found that the CAPs were not "bona fide CLECs" and invalidated their tariffs *ab initio*. In doing so, they removed the CAPs from the CLEC regulatory regime for all periods relevant to the instant proceeding. The CAPs deny that the "functional equivalent" findings of the *Northern Valley* orders have anything to do with the case at bar. As discussed in the CAPs' answer to paragraph 75, AT&T is estopped from arguing that the services that the CAPs caused to be provided to AT&T are anything but switched access

[79] Petition for Reconsideration and Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc. and ChaseCom, filed in the instant docketed proceeding and dated April 24, 2013, at _____.

service. The services at issue are the Local Switching "tail circuit" of Beehive terminating switched access service, charged at the same rates listed in the Beehive tariff. The CAPs agree that, both subsequent to the adoption of the *Connect America Order*, and prior to it, access stimulation services are, and always have been, switched access services. The CAPs deny that this reality has any bearing on their regulatory classification – the CAPs are not common carriers because the *Liability Order* found they were not "bona fide CLECs" and invalidated their tariffs retroactively. The CAPs note that AT&T's statement in this paragraph 86 constitutes an admission by AT&T that the service that the CAPs caused to be provided to AT&T is switched access service, and must be compensated at the applicable tariffed switched access rates that applied at the time the service was provided. Those rates are the Beehive tariffed rates, which AT&T has never contested, and which AT&T is obligated to pay pursuant to its settlement agreement with Beehive. The CAPs deny AT&T's assertion that there is no regulatory "gap" in the regulatory system that applies to the services at issue. The *Liability Order* created the regulatory gap when it invalidated the CLEC tariffs retroactively, years after they caused millions of minutes of terminating switched access service to be provided to AT&T. Regarding footnote 94, the CAPs agree that the Commission "has not yet ruled in a specific case whether traffic pumping LECs can recover alternative compensation, or if so, to what extent." From past Commission decisions, it appears that the Commission is unable to do so. The Commission has long held that it is not a collection agent for carriers against customers,[80] and courts have held that the Commission does not have authority to adjudicate a carrier's rights against its customers.[81] Under this line of decisions, it appears that the

[80] *E.g., Telepacific v. Tel-America,* 19 FCC Rcd 24552 (2004) ("the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges".

[81] *All American Tel. Co. et al. v. AT&T*, 26 FCC Rcd 723 (2011) (IXC acting as a customer cannot violate the Communications Act, and so is not subject to § 208 complaints); *AT&T Corp. et al. v. Bell Atlantic-Pennsylvania,*

Commission does not have authority to name the amount of damages that the CAPs may receive from AT&T. Rather, that determination must be made by the SDNY Court. The CAPs deny AT&T's assertion that the *MetTel v. GNAPs* decision does not apply in this case because there is no "regulatory gap." As the CAPs have demonstrated, by invalidating their tariffs retroactively, the *Liability Order* created precisely the type of regulatory gap that the *MetTel* court addressed, and committed to fill. In doing so, the *Liability Order* removed the CAPs from the regulatory regime, and the CAPs have no recourse absent pursuing their claims in *quantum meruit* before the SDNY Court.

87. The CAPs deny that their pursuit of *quantum meruit* claims before the SDNY Court would "undermine the administration of the [Communications] Act, and they deny that the *PaeTec v. CommPartners* case so holds. The CAPs discuss that case in their answer to paragraph 83, and demonstrate that the court only dismissed equitable claims after it determined that the intercarrier compensation provisions of § 251 of the Communications Act applied, and that the parties had recourse to that regulatory regime. In contrast, the *Liability Order* invalidated the CAPs' tariffs de novo, and made findings that lead to the conclusion that the CAPs are not, and never were, common carriers. Therefore, Title II regulation does not apply to them and they have no recourse under the Commission's regulatory regime. The CAPs deny AT&T's claim that the uniform standard for rates for service would be undermined if the CAPs pursue their *quantum meruit* claims. As the CAPs argued in their pleadings in the Liability Phase of this proceeding, the best way to guarantee uniformity in service rates would be to uphold the CAPs' tariffs and enforce the Filed Rate Doctrine, which has been guaranteeing rate uniformity for about a century. Unfortunately, the *Liability Order* ignored this common sense

---

et al., 14 FCC Rcd 556, 559 ¶ 98 & n. 240, citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1419 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1240 (1996) (Commission cannot consider offsets from customer in awarding damages against a carrier, because it has no authority to assess damages against non-carriers).

argument. Nevertheless, the CAPs have demonstrated that, no matter what legal theory is employed, only one rate can apply to the traffic at issue – the Beehive tariffed rates for Local Switching in effect at the time the service was provided. The CAPs demonstrated that this would be the outcome if the *Total Telecom* case applied, and the Commission found the CAPs to be "shams," which it did. Under *Total Telecom*, the Commission found that the tariffed rates of the underlying incumbent LEC applied, which common-sense rationale would require the Beehive rates apply in this case. Moreover, when courts consider *quantum meruit* claims, they avoid judicial ratemaking by applying the prevailing rates for the same service in the same area – which in this case is the Beehive tariffed Local Switching rates.[82] And this outcome is also required by the settlement agreement that AT&T had with Beehive, and that was operative at all times relevant to the instant case.[83] In all cases, there is only one rate that can apply to the traffic at issue in this proceeding. The CAPs deny that their recourse to equitable relief at court will create a new paradigm in which "any carrier could effectively deregulate itself" – to get to where we are today, we are 7 years after the CAPs filed their SDNY collection action, AT&T has driven all three CAPs out of business by imposing a crushing legal burden on them, the Genachowski Administration made a series of extremely unfortunate choices by ignoring decades of precedent and invalidating the tariffs of numerous LECs retroactively, without ever resolving the ultimate dispute between the LECs and the IXCs. It is unlikely that this course will be taken up by other carriers as an attractive business plan. It is also highly unlikely that this Commission will see leadership that demonstrates such an insouciant disregard for established precedent, its statutory obligation to resolve disputes in a timely manner, its own rules governing how to provide timely guidance to courts that have issued primary jurisdiction

[82] Legal Analysis in Support of the CLECs' Answer to AT&T's Amended Formal Complaint, filed in the instant proceeding and dated June 14, 2010, at 41-48.

[83] See discussion in the Brief being filed with this Answer.

referrals, and plain common sense, as has been demonstrated in the *Liability Order*. The CAPs deny that AT&T's reference to the tariffing requirements of § 203 of the Act as only being susceptible to change by Congress is relevant to this case. The *Liability Order* invalidated the CAPs' tariffs retroactively, and reached conclusions that have the effect of classifying the CAPs as non-common carriers. The regulatory requirements of Title II do not apply to them.

88. The CAPs deny AT&T's assertions that the Commission can pre-empt the Court's authority to hear the CAPs' claims in equity, stated in paragraph 88 and footnote 96. AT&T cites no authority for this proposition, and none exists. Indeed, the Commission lacks authority to hear CAPs claims for damages against AT&T, as a non-carrier, in any event.[84] AT&T does not even try to explain how the Commission can exercise pre-emption in an area where it has no statutory authority. To the extent AT&T has arguments for the SDNY court, it should make them there, and not in this proceeding.

89. The CAPs deny that the *Liability Order* ever found that the CAPs "provided no services to AT&T." The CAPs have discussed earlier in this Answer and in the accompanying Brief that AT&T is estopped from making this assertion by its earlier stipulations and pleadings, its expert witness testimony, and its settlement agreement with Beehive. AT&T's assertion that "any services they [the CAPs] did provide are pre-empted by the Act and the Commission's rules" simply makes no sense, and the CAPs are unable to respond to it.

90. The CAPs admit that AT&T correctly quotes Referral Issue 5 in paragraph 90.

91. The CAPs admit that AT&T correctly quotes Referral Issue 5a in paragraph 91.

92. The CAPs admit AT&T's assertion that the Commission need not consider whether the rates in the CAP tariffs, which mirror the rates in the Beehive tariff, were

---

[84] *E.g., Telepacific v. Tel-America,* 19 FCC Rcd 24552 (2004) ("the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges".

"presumed to be just and reasonable," because AT&T is estopped from asserting otherwise. As demonstrated in the CAPs' answer to paragraph 61, AT&T has stipulated that it is not contesting the Beehive rates, and the *Toof Report* confirms that the MOUs reflected in the invoices are accurate. And paragraph 33 and footnote 145 of the *Liability Order* confirm that Beehive's rates are not at issue. AT&T is therefore estopped from contesting the reasonableness of the rates now, and this matter cannot be factored into its asserted claims for damages. The CAPs deny that the issue whether or not they were "competing" with Beehive is irrelevant to the Damages Phase of this proceeding.

93. The CAPs admit that AT&T correctly quotes Referral Issues 5c and 5d.

94. The CAPs deny that these referred issues have "no bearing" on the other referred issues. Referred issues 5a and 5d go to uniformity of rates for the same service, which is the sole focus of tariffs, the Commission's rate prescription authority, and the Filed Rate Doctrine. Just seven paragraphs earlier, in paragraph 87, AT&T expresses its despair that the CAPs' recourse to equitable relief would disrupt the "uniform federal standard in the Communications Act." Now it should not be heard to argue that questions regarding rate uniformity "have no bearing" on the guidance this Commission is obligated to provide to the SDNY Court. The CAPs deny AT&T's assertion in paragraph 94 that there is no record in the proceeding of different LECs charging different rates for the same service, or the same LEC charging different customers different rates for the same service. The CAPs have made it abundantly clear in their filings that, whether their tariffs apply or not, there is no rate other than the Beehive tariffed rate (Legal Analysis in Support of the CLECs' Answer to AT&T's Amended Formal Complaint, filed in the instant docketed proceeding and dated June 14, 2010, at 41-48), which AT&T admits the CAPs matched in their invoices (7/16/10 stipulation # 45). Should AT&T be

awarded a rate of "zero" for the Local Switching services that were provided to it by Beehive, through the agency of the CAPs, the CAPs, which believed themselves to be CLECs at the time, would charge a different rate than the Beehive ILEC for the same service in the same territories. Conversely, because the *Liability Order's* "sham" decision effectively confirms that Beehive was the service provider, consistent with the Commission's *Total Telecom* decision, AT&T would receive Local Switching at a rate of "zero" while Beehive's other customers paid the full Beehive filed tariff rate. This outcome would upset the "uniform federal standard" that was disrupted when the *Liability Order* invalidated the CAP tariffs retroactively. That balance can be restored if this Commission advises the SDNY Court of the importance of rate uniformity in its responses to Referral Issues 5c and 5d, so that the SDNY Court can award the proper level of damages in response to the CAPs' claims of quantum meruit and quasi-contract.

95. The CAPs deny that awarding AT&T a rate of "zero" would be appropriate. Such a rate would unreasonably discriminate in favor of AT&T, would unjustly enrich AT&T and would unreasonably diminish the CAPs. The CAPs deny that the existence of competition *vel non* between the CAPs and Beehive is relevant to the instant case, in which the Commission must respond to the SDNY Court's referrals. The CAPs agree that the Commission's *Connect America Order* closed an arbitrage loophole that existed in the Commission's access charge rules as they applied to CLECs. That Order closed the loophole consistent with decades of Commission precedent, by effecting prospective changes in the rules, and requiring uniform changes in tariffed rates so that no customer would receive discriminatorily favored rates. This uniformity was ignored by the Genachowski Administration took the unprecedented step of invalidating the tariffs of numerous parties retroactively, thereby creating unreasonably discriminatory effects that remain unresolved to date. Footnote 97 is a citation that does not

require a response. Regarding footnote 98, the CAPs agree that the Commission's rules allow CLECs to charge rates lower than the ILEC benchmark rates, but there is no evidence on the record of this proceeding whether, or to what extent, CLECs have done so. The CAPs admit that AT&T accurately quotes the *CLEC Access Charge Reform Order*.

96. The CAPs admit that AT&T accurately quotes their March 19 Statement. The CAPs admit that it is "generally unobjectionable" that carriers collect the same rates from different customers for the same service, in fact the 100-year old history of the Filed Rate Doctrine demonstrates that the Commission and the courts find such absence of unreasonable discrimination more than "unobjectionable" – they find it to be a critical policy objective, mandated by the Communications Act. The CAPs deny that AT&T is not subject to damages under the CAPs' *quantum meruit* claim pending before the SDNY Court. Moreover, the CAPs note that the Commission has neither the inclination nor the authority to set damages for the CAPs in the case at bar, which is why the CAPs brought their collection action before the SDNY Court in the first instance. The CAPs deny that the nondiscrimination provisions of the Communications Act and the Filed Rate Doctrine are not relevant to the instant proceeding, and the CAPs believe that the Commission can advise the SDNY Court that it could avoid such unreasonable discrimination by awarding the Beehive tariffed rate as the appropriate measure of *quantum meruit* damages. The CAPs admit that AT&T's proposal to force the CAPs to provide service for free to all long distance carriers would be one way to avoid unreasonable discrimination in AT&T's favor, but the CAPs deny that such an outcome is achievable, given the restrictions of the 5th Amendment's prohibition on uncompensated takings, and the statute of limitations.

97. The CAPs admit that AT&T correctly quotes Referral Issue 5e.

98. The CAPs deny that they "did not provide any services to AT&T." As discussed at length earlier in this Answer, AT&T cynically takes the *Liability Order's* finding that the CAPs did not provide service "pursuant to their tariffs" and asserts that it never received any service at all, which simply disregards reality. As the CAPs demonstrate in this Answer and its accompanying Brief, AT&T is estopped by its stipulations, pleadings, expert testimony, and the findings of the *Liability Order* from pursuing this argument. The CAPs admit that the access stimulation services that AT&T took are switched access services, and that the *Farmers* and *Jefferson Tel.* cases support this conclusion, as does the *Connect America Order*. The CAPs admit that it is an "indisputable fact" that the service that AT&T took in this case is terminating Switched Access Service. The CAPs agree that this finding should be part of the Commission's response to Referral Issues 2 and 3, but deny that this would be a complete response. The complete response should include an affirmation that, in light of the ruling in the *Liability Order*, the service was actually provided by Beehive, through the agency of the CAPs, consistent with the Commission's finding in the *Total Telecom* case. The CAPs deny AT&T's assertion that it is "not necessary for the Commission to classify any services the Defendants might have provided" – the Court expressly referred this question, and the clarification that the millions of minutes of service that AT&T took are terminating switched access service, provided by Beehive, is important to the SDNY Court's determination of the damages that the CAPs are due pursuant to their equitable claims. The CAPs deny AT&T's assertion that the CAPs are "not entitled to compensation," and the Commission is without authority to make such a determination – it lacks authority to award damages from customers to their carriers. It is the SDNY Court that will determine the damages to which the CAPs are entitled. The CAPs admit that the *Liability Order* found that they were operating as sham CLECs, but deny that the

access charges they invoiced to AT&T were unreasonable. The CAPs have demonstrated in their previous filings (*e.g.*, Legal Analysis in Support of the CLECs' Answer to AT&T's Amended Formal Complaint, filed in the instant docketed proceeding and dated June 14, 2010, at 41-48), and in this Answer and accompanying Brief, that the Beehive tariffed Local Switching rates are the only rates that can apply to the traffic that AT&T admittedly took, that such a finding is compelled by the *Total Telecom* decision (answer to paragraph 68), and that AT&T is estopped from contesting the applicability of the Beehive rates (answer to paragraph 61 and *passim*).

COUNT I
DIRECT DAMAGES OF PAYMENTS TO THE DEFENDANTS

99. Paragraph 99 does not require a response.

100. The CAPs admit that paragraph 100 is an accurate summary of the findings of the *Liability Order.*

101. All American admits it received $249,014.60 in payment from AT&T.

102. The CAPs deny that AT&T is entitled to a remand of the amount claimed in paragraph 101. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and would be unjustly enriched – and All American unreasonably diminished – should this amount be refunded. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

103. e-Pinnacle admits it received $3,145.36 in payment from AT&T.

104. The CAPs deny that AT&T is entitled to a remand of the amount claimed in paragraph 103. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and

would be unjustly enriched – and All American unreasonably diminished – should this amount be refunded. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

105. ChaseCom admits it received $336.41 in payment from AT&T.

106. The CAPs deny that AT&T is entitled to a remand of the amount claimed in paragraph 105. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and would be unjustly enriched – and All American unreasonably diminished – should this amount be refunded. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

107. The CAPs deny that AT&T is entitled to interest because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

108. The CAPs are not allowed under the Commission's rules to seek offset in the instant proceeding. 47 C.F.R. § 1.722(i)(4). The Commission is prohibited from considering offsets from non-carriers in damage awards.[85]

109. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that they are not entitled to compensation (answer to paragraph 63 and *passim*), or that AT&T is entitled to any damages (answer to paragraph 6 and *passim*).

110. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that their

[85] *AT&T Corp. et al. v. Bell Atlantic-Pennsylvania, et al.*, 14 FCC Rcd 556, 559 ¶ 98 & n. 240, citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1419 (D.C. Cir. 1995), *cert. denied,* 517 U.S. 1240 (1996) (Commission cannot consider offsets from customer in awarding damages against a carrier, because it has no authority to assess damages against non-carriers).

equitably claims against AT&T, now pending in the SDNY court, are pre-empted by any federal regulatory regime. Answer to paragraph 81, citing *MetTel v. GNAPS*, and *passim*.

111. The CAPs deny that AT&T is entitled to a remand of the amount claimed. AT&T has not met the Commission's requirements for demonstrating damages, has not shown it was harmed by making the payment for the services it admittedly received, and would be unjustly enriched – and the CAPs unreasonably diminished – should AT&T be awarded a refund.

COUNT II
DAMAGES FOR PAYMENTS TO BEEHIVE

112. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

113. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

114. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

115. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

116. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

117. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

118. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

119. The CAPs deny that AT&T pay pursue damage claims for payments to Beehive because such a claim has been disallowed by the *October 29, 2014 Letter Ruling.*

COUNT III
OTHER REFERRED ISSUES

120. Paragraph 120 does not require a response.

121. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that they are not entitled to compensation (answer to paragraph 63 and *passim*).

122. The CAPs deny that the only way they can be compensated for the service that AT&T took is by tariff or express contract, and that they are precluded from seeking damages in equity from the SDNY Court. Answer to paragraph 81, citing *MetTel v. GNAPS*, and *passim*.

123. The CAPs admit that, because the *Liability Order* invalidated their tariffs retroactively, the did not have an applicable tariff on file, or an express contract with AT&T.

124. The CAPs deny that they are precluded from seeking damages in equity from the SDNY Court. Answer to paragraph 81, citing *MetTel v. GNAPS*, and *passim*. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*.

125. The CAPs deny that the Beehive tariffed rates are irrelevant to the case at bar or to the Commission's response to the SDNY Court's Referral Issues. The Beehive tariffed rates are the only rates that can apply to the traffic at issue in this proceeding. Answer to paragraph 98 and *passim*.

126. The CAPs deny that considerations of unreasonable discrimination are irrelevant to the case at bar, or to the Commission's response to the SDNY Court's referral issues. Answers to paragraphs 95 and 96, and *passim*.

127. The CAPs deny that they are common carriers. The findings of the Liability Order establish that they are not. Answer to paragraph 17 and *passim*. The CAPs deny that AT&T did not receive services through them, and AT&T is estopped from so claiming. Answer to paragraph 61 and *passim*. The CAPs deny that the Commission should ignore the SDNY Court's Referral Issues regarding the classification of the service that AT&T took. Such classification is important to the Court in evaluating the CAPs' equitable claims for damages. Answer to paragraph 98. The CAPs agree that the services that AT&T took can only be classified as switched access service, and have shown that the Commission's *Total Telecom* and *Connect America* orders require such a finding. Answer to paragraph 56 and *passim*.

128. The CAPs deny that AT&T is entitled to any damages. Answer to paragraph 36 and *passim*.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(Wrong Venue under 47 U.S.C. § 207)

In its answer and counterclaims to the collection action filed by All American, e-Pinnacle and ChaseCom in the Southern District of New York, AT&T seeks damages against them. In making this claim, AT&T selected the venue for pursuing its damage claims against those parties, and is prohibited under 47 U.S.C. § 207 from seeking damage awards from this Commission. See accompanying Brief at 5-7.

SECOND AFFIRMATIVE DEFENSE
(Lack of Jurisdiction; Failure to State Justiciable Claim)

AT&T's Supplemental Complaint for Damages fails to state a claim against Defendants upon which relief can be granted. The *Liablity Order* establishes that the CAPs are not common carriers – and never were – and so the Commission lacks jurisdiction to adjudicate

claims against them. Also, because they are not common carriers, the CAPs are not subject to the rate regulation and rate prescription requirements of §§ 201-204, or the formal complaint requirements of § 208, or the damages provisions of §§ 207 and 209 of the Communications Act. See accompanying Brief at 7-8.

THIRD AFFIRMATIVE DEFENSE
(Judicial Estoppel Based on Settlement Agreement)

At all times relevant to this case, the rates for all AT&T calls carried by Beehive (which includes all Defendant traffic at issue in this case) were governed by a settlement agreement executed by AT&T and Beehive on August 20, 2007. A copy of that agreement is appended to the Brief that accompanies this Answer at CAP Confidential Exhibit B. Under that agreement, AT&T agreed to pay, and did pay, Beehives' tariffed rates, and is estopped from claiming that any other rates apply to the traffic at issue in the instant case. See accompanying Brief at 8-10.

FOURTH AFFIRMATIVE DEFENSE
(Judicial Estoppel Based on Stipulations, Pleadings,
Expert Witness Testimony and Unrelated Court Actions)

In the "Liability Phase" of the instant proceeding, AT&T stipulated that Defendants terminated, or caused to be terminated, the calls that AT&T sent to them; that the Defendants' invoiced access charges that matched Beehives' tariffed access charges; and that AT&T is not contesting Beehive's rates. AT&T is estopped from now asserting that it did not receive termination service from Defendants, or that any rate other than the Beehive rate is applicable to that traffic. See accompanying Brief at 12-13.

FIFTH AFFIRMATIVE DEFENSE
(Uncompensated Taking Under the Fifth Amendment)

By the Commission's rules and orders, both the CAPs and AT&T were prohibited from blocking the traffic at issue. Under the Genachowski Administration, the Commission took the

unprecedented step of refusing All American to amend its tariff, and forced it to re-file its old tariff, which the Commission later voided *ab initio* on the basis of the language that All American tried to change. The Genachowski Administration ignored or denied three All American petitions for declaratory ruling, which sought timely resolution of the dispute between the CAPs and AT&T for almost five years. By these actions, the Commission required the CAPs to provide, or to cause Beehive to provide, service to AT&T. Should the Commission grant the relief sought by AT&T – essentially setting a rate of zero for the service that AT&T admittedly took – such a ruling would be an uncompensated taking, in violation of the Fifth Amendment of the Constitution, and so is disallowed. See accompanying Brief at 17-18.

SIXTH AFFIRMATIVE DEFENSE
(Unjust Enrichment)

AT&T received payment from its end user customers, call aggregators, and least-cost-routing customers for every call terminated, or caused to be terminated, by Defendants. The Commission has recognized in its *Farmers & Merchants* and *Total Telecom* decisions that this is a significant value, for which the service providers require compensation. Forcing the CAPs to provide termination service to AT&T for free would unjustly enrich AT&T and unreasonably diminish the CAPs. The CAPs note that this is an equitable argument that involves an award of damages to them, and that the Commission cannot provide such relief. However, the prima facie showing of unjust enrichment is enough to dismiss the damage claims of AT&T. See accompanying Brief at 17.

SEVENTH AFFIRMATIVE DEFENSE
(Failure to Meet Burden of Proof)

AT&T does not even attempt to make a factual showing that it has been harmed by the CAPs' actions such that it merits damages. Rather, it merely advances a flawed and demonstrably wrong legal argument that the CAPs cannot force it to pay for the services it took. This does not meet the rigorous standard for demonstrating damages that the Commission's rules require. Also, in the "Liability Phase" of the instant proceeding, AT&T's expert witness David Toof asserted that, under his calculations, the "cost-based" rates for the AT&T traffic terminated by Defendants should be 0.2 cents or 0.3 cents. Defendants have demonstrated that these calculations are wrong. Nevertheless, on the basis of its expert's prior testimony, AT&T's pleadings, and the finding in the *Liability Order* that Beehive's rates are not at issue, AT&T is now estopped from claiming that the rate that should apply to the traffic at issue is zero. See accompanying Brief at 15-17.

INFORMATION DESIGNATION

There is no change to the Information Designation originally made by the CAPs in the Answer of All American Telephone Co., e-Pinnacle Communications, Inc. and Chasecom, filed in the instant docketed proceeding and dated December 31, 2009, at pages 32-34.

PRAYER FOR RELIEF

The CAPs respectfully request that the Commission:

(1) Dismiss AT&T's damage claims without prejudice, so that it may pursue them before the SDNY Court, if they have merit. Contemporaneous with the filing of this Answer, the CAPs are fililng a Motion to Dismiss the AT&T Supplemental Complaint for Damages.

(2) Issue a Declaratory Ruling to finally provide the SDNY Court with the guidance it requested five years ago. Contemporaneous with the filing of this Answer, the CAPs are fililng a Petition for Declaratory Ruling with a Proposed Order proposing specific responses to the SDNY Court's Referral Issues.

Respectfully submitted,

Jonathan E. Canis
Arent Fox LLP
1717 K Street, N.W.
Washington, D.C. 20006
Tele: 202-857-6117
Email: jonathan.canis@arentfox.com
NOTE: The above address reflects a change in the zip code for the Arent Fox DC office.

Dated: December 1, 2014

CERTIFICATE OF SERVICE

I, Michele Depasse, hereby certify that I have this 1st day of December, 2014, caused a copy of the following **ALL AMERICAN TELEPHONE CO., e-PINNACLE COMMUNICATIONS, INC. AND CHASECOM ANSWER AND AFFIRMATIVE DEFENSES RE AT&T CORP.'S SUPPLEMENTAL COMPLAINT FOR DAMAGES** to be delivered via electronic mail, hand delivery or U.S. Mail, to the following persons:

Marlene Dortch (by Hand Delivery)
Secretary
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Rosemary McEnery (by Email & Hand Delivery)
Deputy Chief
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
rosemary.mcenery@fcc.gov

Lisa Griffin (by Email & Hand Delivery)
Deputy Chief
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
lisa.griffin@fcc.gov

A.J. DeLaurentis (By Email & Hand Delivery)
Special Counsel
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
anthony.delaurentis@fcc.gov

Joel Kaufman (By Email & Hand Delivery)
Associate General Counsel and Chief,
Administrative Law Division
Office of General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
joel.kaufman@fcc.gov

James F. Bendernagel, Jr. (by Email & Hand Delivery)
David L. Lawson
Michael J. Hunseder
Sidley & Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
jbendernagel@sidley.com
dlawson@sidley.com
mhunseder@sidley.com

Mr. Brendan J. McMurrer (by US Mail)
AT&T Inc.
One AT&T Way
Bedminister, NJ 07921

Best Copy and Printing, Inc. (by Email and Hand Delivery)
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Michele A. Depasse